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In the Supreme Court of the United States

OCTOBER TERM, 1978

BERNARD G. RUBIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CURCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

JEROME M. FEIT,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals is reported at 559 F. 2d 975.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1977. A petition for rehearing was denied on November 2, 1977. The petition for a writ of certiorari was filed on December 2, 1977. A supplemental petition for rehearing was denied by the court of appeals on April 11, 1978. The supplemental petition for a writ of certiorari was filed on May 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly invoked the concurrent sentence doctrine in deciding not to review two of the 103 counts on which petitioner was convicted.

STATEMENT

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on 103 counts charging him with embezzlement of funds from union and employee welfare benefit plans (in violation of 29 U.S.C. 501(c), 18 U.S.C. 664), racketeering (in violation of 18 U.S.C. 1962(c)), false statements on income tax returns (in violation of 26 U.S.C. 7206(1)), and failure to keep labor union records (in violation of 29 U.S.C. 436, 439). He was sentenced to five years' imprisonment on each of 86 embezzlement counts,[1] three years' imprisonment on each of three tax evasion counts, and one year's imprisonment on each of eight counts charging a failure to keep union records. He was also fined a total of $50,000. All prison sentences were to run concurrently.[2] The court of appeals affirmed in a comprehensive opinion (Pet. App. 1-44).[3]

Relying on the concurrent sentence doctrine, the panel declined to consider two claims relating only to the two embezzlement counts charging petitioner with obtaining unlawful salary increases (Pet. App. 37 n. 14).[4] These two counts involved approximately $329,000.

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[1]Petitioner was acquitted on two embezzlement counts.

[2]Our brief in opposition mistakenly reported that petitioner was sentenced to concurrent terms of five years' imprisonment on each of the 103 counts.

[3]"Pet. App." refers to the Appendix in the original petition.

[4]The remaining 84 embezzlement counts were based on petitioner's receipt of multiple reimbursement for expenses incurred in the course of his duties as a union officer and representative. Petitioner illegally obtained approximately $55,000 through the submission of duplicate vouchers, primarily for travel and entertainment expenses.

2. Petitioner filed a timely petition for rehearing arguing that the prosecutor improperly cross-examined two defense witnesses about their prior refusal to testify before the grand jury. The court of appeals denied the petition on November 2, 1977. Petitioner thereupon filed a petition for a writ of certiorari raising the same claim as in his petition for rehearing. That claim was unrelated to the two counts on which the court of appeals pretermitted review in reliance on the concurrent sentence doctrine.

On January 23, 1978, petitioner filed a supplemental petition for rehearing in the court of appeals. He contended that the panel should not have invoked the concurrent sentence doctrine and instead should have reviewed the unauthorized salary increase counts. Petitioner theorized that, under current United States Parole Commission guidelines, he will be subject to a longer period of incarceration if the two embezzlement counts are left unreviewed than he would be if the two counts were reviewed and reversed.

Under the guidelines, the approximate length of time to be served before release on parole is determined by reference to a matrix involving two variables, the severity of the offense committed and the personal characteristics of the offender.[5] See 42 Fed. Reg. 39813-39815, as amended by 42 Fed. Reg. 52399 (to be codified at 28 C.F.R. 2.20). The severity of embezzlement depends on the amount embezzled. The offense's possible designations, together with the corresponding monetary

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[5]The guidelines assign each prospective parolee a "salient factor score" based on the following considerations: number of prior convictions, number of prior incarcerations, age at first commitment, parole and probation history, employment history, history of heroin or opiate dependence, and whether the commitment offense involved auto theft or checks.

amounts, are as follows: "low moderate" (less than $1,000), "moderate" ($1,000 to $19,999), "high" ($20,000 to $100,000), and "very high" ($100,000 to $500,000) (42 Fed. Reg. 39813-39814). The 84 embezzlement counts reviewed by the court of appeals involved approximately $55,000. The two unauthorized salary increase counts on which the panel pretermitted review involved $329,031. Taken together, all the embezzlement counts would qualify petitioner's offense for placement in the "very high" severity category; the reviewed counts alone would indicate a "high" severity rating.[6] Within any given personal characteristics category, the guidelines recommend a term of incarceration that increases as offense severity increases. For example, if petitioner were to receive a "very good" personal rating, the recommended period of incarceration would be 26-36 months if the offense severity were "very high" and 16-20 months if the offense severity were only "high."

DISCUSSION

We believe that the court of appeals should not have applied the concurrent sentence doctrine in the circumstances of this case. Petitioner challenged his two unreviewed embezzlement convictions on grounds relating to his guilt or innocence, and the unreviewed counts, when considered by the Parole Commission, will qualify petitioner's commitment offense for placement in the "very high" rather than the "high" severity category.[7]

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[6]The Parole Commission retains discretion to depart from the guidelines "[w]here the circumstances warrant * * *." See 49 Fed. Reg. 39813, §2.20(c), (d).

[7]Although its guidelines do not obligate the Parole Commission to rate petitioner's offense severity in the "very high" category, the probability is great that the Commission will adhere to the guideline recommendations in any given case. See, *e.g.*, *Ruip* v. *United States*, 555 F. 2d 1331 (C.A. 6); *United States* v. *Salerno*, 538 F. 2d 1005 (C.A. 3).

Under these circumstances, there is a significant likelihood that petitioner will suffer adverse collateral consequences as a result of the unreviewed convictions. Application of the concurrent sentence doctrine in such a situation is improper.

In *Benton* v. *Maryland*, 395 U.S. 784, 787-791, this Court reviewed the historical evolution of the concurrent sentence doctrine and recognized the utility of that doctrine as "a rule of judicial convenience." Finding that the dispute in *Benton* did not present the question, the Court expressly abstained from considering whether constitutional problems might be created by "an attempt to impose collateral consequences after an initial refusal to review a conviction on direct appeal because of the concurrent sentence doctrine * * *" (395 U.S. at 791 n. 7). In his concurring opinion, Mr. Justice White agreed that "the concurrent sentence rule * * * should be preserved as a matter of proper judicial administration both on direct appeal and collateral attack, although at least in theory it raises a number of questions concerning the subsequent effects of the unreviewed counts" (395 U.S. at 800). See also *Andresen* v. *Maryland*, 427 U.S. 463, 469 n. 4; *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

In the aftermath of *Benton*, the Fifth Circuit has stated that application of the concurrent sentence doctrine is appropriate when "prejudice is not apparent and the possibility of adverse collateral consequences appears to be remote." *United States* v. *Binetti*, 547 F. 2d 265, 269 (C.A. 5). See also *United States* v. *Smith*, 550 F. 2d 277, 285 (C.A. 5); *Government of the Canal Zone* v. *Fears*, 528 F. 2d 641, 644 (C.A. 5). Cf. *Carafas* v. *LaVallee*, 391 U.S. 234, 237. In an effort to demonstrate that the possibility of adverse collateral consequences from his unreviewed convictions is more than remote, petitioner points to the potential effect of those convictions on his prospects for

parole. He cites a recent Eighth Circuit decision in which the court of appeals refused to apply the concurrent sentence doctrine because it feared an unreviewed conviction would reduce appellant's parole opportunities. See *United States* v. *Holder*, 560 F. 2d 953 (C.A. 8).[8] Resolution of the issue thus presented requires an inquiry into the usual basis for Parole Commission determinations regarding the length of time to be served before release.

The Parole Commission advises us that in assigning a severity rating to the offense or offenses for which a prisoner has been incarcerated, it looks to the actual conduct underlying the criminal charges brought against him. As reflected in the United States Parole Commission Research Unit, *Guideline Application Manual* (November 1977),[9] the Commission considers any specific criminal

[8]Despite its ruling in *Holder*, the Eighth Circuit has not abandoned the concurrent sentence doctrine. See, *e.g.*, *United States* v. *Eisler*, 567 F. 2d 814, 818 (C.A. 8).

Other courts of appeals have followed a variety of approaches. The Seventh Circuit, for example, has said that it will consider the validity of all challenged convictions unless "there is no possibility of undesirable collateral consequences attendant upon these convictions." *United States* v. *Tanner*, 471 F. 2d 128, 140 (C.A. 7), certiorari denied, 409 U.S. 949; see also *Crovedi* v. *United States*, 517 F. 2d 541, 550 (C.A. 7); *United States* v. *McLeod*, 493 F. 2d 1186, 1189 and n. 1 (C.A. 7). The Sixth Circuit has exercised its discretion to resolve some claims and pretermit others, without stating a general rule. Compare, *e.g.*, *United States* v. *Maze*, 468 F. 2d 529 (C.A. 6), affirmed, 414 U.S. 395, with *Ethridge* v. *United States*, 494 F. 2d 351 (C.A. 6), certiorari denied, 419 U.S. 1025. The District of Columbia Circuit routinely vacates concurrent sentences, subject to reinstatement and full appellate review if the sentence considered and affirmed on appeal should be set aside by this Court or on collateral attack. See, *e.g.*, *United States* v. *Hooper*, 432 F. 2d 604 (C.A. D.C.).

[9]A copy of the Commission's Guideline Manual has been lodged with the Clerk of this Court.

behavior that can be reliably established, even if the prisoner involved has been convicted of a lesser offense or fewer offenses as the result of a plea bargain. This practice has received judicial approval. See, *e.g.*, *Billiteri* v. *United States Board of Parole*, 541 F. 2d 938 (C.A. 2); *Bistram* v. *United States Parole Board*, 535 F. 2d 329 (C.A. 5); *Lupo* v. *Norton*, 371 F. Supp. 156 (D. Conn.); *Manos* v. *United States Board of Parole*, 399 F. Supp. 1103 (M.D. Pa). Similarly, where a prisoner has been convicted on several counts, the Commission considers the actual conduct underlying all the convictions, even if some of those convictions have been reversed on appeal, at least as long as the reversal is for reasons unrelated to guilt or innocence (*e.g.*, a court of appeals ruling that the district court improperly admitted illegally seized evidence). At least one court of appeals has endorsed this practice in connection with the Commission's evaluation of the prior conviction factor in setting a prisoner's personal characteristics rating. See *Dye* v. *United States Parole Commission*, 558 F. 2d 1376 (C.A. 10). The procedure is equally valid in determining the severity rating for a prisoner's commitment offense.

Accordingly, where an appellant challenges his conviction on certain counts but does not raise a claim that calls into question the finding of guilt, the court of appeals generally need not fear that adverse parole consequences will result from a decision to pretermit consideration of those counts in reliance on the concurrent sentence doctrine.[10] In such cases, the Parole

[10]The Eighth Circuit's decision in *Holder* thus fails to give adequate consideration to the method by which the Parole Commission actually determines a prisoner's offense severity rating. Appellant in that case argued that the district court erred in admitting co-conspirator testimony that helped establish his participation in a certain heroin sale. The court of appeals refused to apply the concurrent sentence doctrine and reviewed appellant's conviction on

Commission would consider the underlying conduct in determining offense severity, regardless of the disposition on appeal. Even if the challenged convictions were reversed, the appellant's parole treatment would not change.[11]

Here, however, petitioner raised in the court of appeals two claims of error, both of which related to his guilt or innocence on the two embezzlement counts charging him with obtaining unauthorized salary increases from union funds. He contended first that the district court improperly excluded on hearsay grounds petitioner's own testimony concerning conversations with other union officials in which they allegedly stated that the union constitution is a "living and flexible document" that should be interpreted and applied with the welfare of the membership uppermost in mind. Petitioner maintained that these statements of other union officials were offered not to prove the truth of the matter asserted, *i.e.*, not to prove that their characterization of the union constitution was accurate, but to negate petitioner's criminal intent in arranging the unauthorized salary increases. Secondly,

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the count of distributing heroin that arose from that sale. The court agreed with appellant that the coconspirator testimony should have been excluded and found the remaining evidence insufficient to sustain appellant's conviction. Accordingly, the court reversed on this count but affirmed on another count of distributing heroin. Even after this disposition, the Parole Commission will consider both sales in determining appellant's offense severity. Appellant's parole prospects would have been no worse if the court had applied the concurrent sentence doctrine.

[11]Of course, if the court of appeals can identify other adverse collateral consequences that the appellant might reasonably expect to suffer as the result of unreviewed convictions, invocation of the concurrent sentence doctrine might be improper for reasons wholly unrelated to the appellant's parole opportunities.

petitioner argued that the district court incorrectly instructed the jury on the level of fiduciary duty petitioner was required to meet in order to avoid criminal liability under 29 U.S.C. 501(c). While neither of these claims seems meritorious,[12] they do relate broadly to guilt or innocence and thus would have some bearing on the Parole Commission's view of petitioner's conduct.

In sum, the crimes involved, if considered by the Parole Commission, would clearly qualify petitioner for a higher offense severity rating than he otherwise would be likely to receive. On the other hand, reversal of the convictions on the grounds pressed by petitioner would probably cause the Parole Commission not to assign the higher rating based on the conduct underlying those convictions. Since there is a significant likelihood that the unreviewed convictions will lengthen the duration of petitioner's incarceration, the concurrent sentence doctrine should not have been applied.

In some cases, a court of appeals wishing to apply the concurrent sentence doctrine may have difficulty in ascertaining the potential effect of unreviewed convictions on the appellant's parole prospects. We believe that, because the Parole Commission guidelines are published and are reasonably specific, such instances will be relatively rare.[13] In any event, these are matters best left to be resolved by the courts of appeals in light of the kinds of cases that actually arise and the kinds of difficulties

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[12]Even if the district court should have admitted petitioner's testimony concerning the statements of other union officials, the error was probably harmless, because petitioner did testify about his understanding that the union constitution was a "living and flexible document." The alleged statements by other union officials to the same effect would have been cumulative only.

[13]The Commission has informed us that a copy of its Guideline Application Manual has been sent to each federal district and circuit judge.

actually encountered. Whatever may be the proper rule where the probability of adverse collateral consequences is more problematical, here there appears to be a significant likelihood that a reversal of the unreviewed convictions will affect the length of petitioner's incarceration. Under such circumstances at least, petitioner is entitled to review.

CONCLUSION

The supplemental petition for a writ of certiorari should be granted, and the case remanded to the court of appeals with instructions to review the pretermitted claims. In all other respects, the petition should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

JEROME M. FEIT,
Attorney.

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